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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1015

No. 1322 Misc.

UNITED STATES OF AMERICA, ex rel., SYLVESTER JOHNSON and STANLEY CASSIDY,

Petitioners,

vs.

HOWARD YEAGER, Principal Keeper of the New Jersey State Prison,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

NORMAN HEINE,
Camden County Prosecutor,
Court House,
Camden, New Jersey

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ARGUMENT.

I.

The petitioners' confessions were voluntary.

At the original trial, the State discharged its burden of proving the petitioners' confessions to have been made voluntarily. Before the confessions were admitted into evidence, the jury was excused and the trial judge conducted a preliminary investigation into their voluntariness (126a-128a).* *State v. Smith*, 32 N. J. 501, 557, 161 A. 2d (1960), cert. den. 364 U. S. 936 (1961).

All of the officers who were present at the interrogation were put on the stand by the State and cross-examined by the three defense counsel (Dube, 157a-162a; Neale, 163a-172a; Conley, 172a-177a; Large, 177a-180a; Large, 181a-189a). Defense counsel probed at length into the method of interrogation, the condition of defendants and their treatment prior to, and during, the transcribing of their statements. Cross-examination failed to elicit any evidence tending to show the confessions involuntary. On the contrary, the evidence showed that defendants were carefully informed of their rights, considerately treated and were asked questions to which they often gave long, narrative responses. These confessions were given in the presence of and transcribed verbatim by the official court stenographer, who corroborated the testimony of the police officers that the defendants were not intimidated, nor mistreated in any manner. These facts were found by the

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* Page numbers refer to Joint Appendix (two volumes) filed with the Court below, nine copies of which have been filed with the court by petitioner.

New Jersey Supreme Court, 34 N. J. 224, 168 A. 2d 7, and the U. S. District Court (48a-68a).

This court has recognized that the findings of a State Court are to be given due regard. *Culombe v. Connecticut*, 367 U. S. 568 (1961). Whether the due process clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession requires an independent determination, and while this Court is not completely bound by State Court determinations of any issue essential to the decision of a claim of Federal right, nevertheless, "as State Courts are charged with the primary responsibility of protecting basic and essential rights, we accord an appropriate and substantial effect to their resolutions of conflict in evidence as to the occurrence or nonoccurrence of factual events and happenings. This is particularly apposite because the trial judge and jury are closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony." *Haynes v. Washington*, 373 U. S. 503 (1963).

The defendants neither took the stand, nor offered any evidence by others in support of their claim that their confessions were obtained through intimidation, physical violence or mental coercion. After the examination of State witnesses who were present at each interrogation, the Court asked each defendant if he desired to offer any testimony or evidence relating to the involuntariness of his confession. Each defendant, after consulting with his counsel, declined to take the stand or offer any evidence in his behalf. (As to Cassidy, 153a; as to Johnson, 220a.)

After the trial judge found all of the confessions voluntary, and therefore admissible, the prosecutor said he assumed that the testimony given in the hearing on admissibility would be re-introduced in the presence of the jury. All three counsel for the defendants announced that they were "satisfied not to go through it again," and agreed that

the confessions be read to the jury without any testimony at all on the issue of voluntariness. 31 N. J. 489, 507, 158 A. 2d 11, 21 (1960).

It is significant to note the observation of the New Jersey Supreme Court, 34 N. J. 224, 168 A. 2d 7, that:

> "On the appeal following defendants' convictions, they did not dispute the trial court's finding of voluntariness."

Notwithstanding, a year and a half passed after the original trial before the defendants decided to take the stand and offer evidence to dispute the voluntariness of their confessions.

While it may be true that Cassidy was arrested at 4:00 A. M. on Wednesday morning, January 29th, and was not given a preliminary hearing until Friday, January 31st, his long, narrative confession began only five hours subsequent to his arrest.

Defendant, Johnson, was arrested in Newark, New Jersey, on January 29th, at approximately 5:00 P. M. He was taken to the Newark Police Bureau, where he remained until night court was held and, after he was given a preliminary hearing, he was placed in jail until approximately 2:00 A. M., when the local police received a call to bring him to Camden, where they arrived between 4:00 and 5:00 A. M. His claim of having been hit several times in Newark and during his drive to Camden, was first revealed at the hearing a year and a half after the original trial. No intimation of this kind of treatment was developed, or even suggested, during the cross-examination of the arresting officers (Conley, 103a-116a; O'Brien, 117a-118a). After his attorney conferred with Johnson, he stated, ". . . there would be no useful purpose served in putting the defend-

ant on the stand" (J402a). The United States District Court, after reviewing all the testimony produced, both at the original trial and at the hearing on the application for a new trial, chose to discredit Johnson's testimony of physical violence.

The United States Supreme Court has declared that the Federal doctrine of exclusion for delay in arraignment is not of constitutional stature and is not applicable to the various states. It remains an exercise of the supervisory authority of the United States Supreme Court in the administration of justice in the Federal courts. *McNabb v. United States*, 318 U. S. 332 (1943). The *McNabb* Rule is a rule of evidence for criminal trials in the Federal Courts and does not arise from constitutional sources. The New Jersey courts have repeatedly declined to follow the Federal rule. *State v. LaPierre*, 39 N. J. 156, 188 A. 2d 10; *State v. Smith*, supra; *State v. Wise*, 19 N. J. 59, 115 A. 2d 62 (1955); *State v. Pierce*, 4 N. J. 252, 72 A. 2d 305 (1950).

Respondent strenuously objects to the introduction of psychiatric and psychological reports as part of the record in these proceedings. (See respondent's (petitioner's) petition for writ of certiorari, docketed April 18th, No. 1018, page 5, et seq.) Petitioners cannot, through the expedient of annexing physicians' reports to a petition for a writ of habeas corpus (17a-39a), create "undisputed" facts upon which to rely. These reports were never proven in court and the State was denied cross-examination of the psychiatrists and psychologists. Defendants' mental state indicated in these psychological and psychiatric evaluations were never related to a period surrounding defendant's interrogation—the period with which we are concerned.

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*Page numbers prefixed by "J" refer to the Joint Appendix, in three volumes, filed in the Supreme Court of New Jersey on direct appeal from the judgments of conviction.

While all relevant circumstances must be considered in determining the admissibility of the confessions, the ultimate question is whether the defendants' will was overborne and their capacity for self-determination seriously impaired. *Culombe v. Conn.*, 367 U. S. 568 (1961). This test governs regardless of the method of coercion, be it physical violence or psychological pressure and is equally applicable to petitioners' inference of a drug-induced statement. *Townsend v. Sain*, 372 U. S. 293 (1963). It is well established that a confession of crime which is proved to have been made by one under the influence of drugs or narcotics is not ipso facto inadmissible in evidence. See Annotation: "Use or administration of drugs or narcotics as affecting admissibility of confession," 69 A. L. R. 2d 384 (1960). It is manifest that any holding of the inadmissibility of a confession because of drug or narcotic influence acting upon the person by whom the confession was made, requires, as a logical foundation, proof that at the time he confessed the defendant was actually so influenced.

None of petitioners' fanciful claims were advanced until a year and a half after the original trial, after their appeal to the New Jersey Supreme Court was denied, and after their application to the United States Supreme Court for certiorari was denied and they stood at the eve of their scheduled execution. In the light of this we can understand their belated grasping at straws concocted in the death house. Credence should not be given to these concoctions.

As a result of co-defendant, Wayne Godfrey's confession being held to be involuntary, 327 F. 2d 311, petitioners rely on *Ashcraft v. Tenn.*, 322 U. S. 143 (1944), as requiring reversal of their convictions. The mere fact that Wayne Godfrey's confession was found to be involuntary by the Court of Appeals, does not require a reversal and remand of petitioners' case to the State court. *Ashcraft v. Tenn.*

supra, is clearly inapposite. In *Ashcraft* this court remanded and reversed the conviction of defendant Ware, who did not confess, because co-defendant Ashcraft's confession, introduced at their joint trial, was found to be involuntary. The court noted:

> "Ware's conviction was sustained by the Tennessee Supreme Court on the assumption that Ashcraft's confession was properly admitted and his conviction valid. Whether it would have been sustained had the court reached the conclusion we have reached as to Ashcraft, we cannot know. Doubt as to what the State court would have done under the changed circumstances brought about by our reversal of its decision as to Ashcraft is emphasized by the position of the State's representatives in this court."

In the case, *sub judice*, neither the trial court nor the New Jersey Supreme Court based its finding of voluntariness of petitioners' confessions on the assumption that co-defendant, Wayne Godfrey's confession was valid. Both petitioners independently signed written confessions acknowledging their participation in the crime. In *Malinski v. New York*, 324 U. S. 401 (1945), this court, in a similar case, stated:

> "The furtherest we have gone in a comparable case from a State Court is to vacate the judgment against the co-defendant who did not confess and remand the case to the State Court for further consideration. Thus, in Ashcraft v. Tennessee . . . we followed that procedure at the suggestion of the Attorney General of the State, where the judgment against the co-defendant who did not confess was sustained by the State Court on the assumption that the confession which we held to be coerced was properly admitted.

and that the conviction of the defendant who did confess was valid."

II.

The State Courts applied the correct standard in determining whether the defendants' confessions were voluntary.

Appellants argue that the New Jersey courts (trial and Supreme) rejected their contentions that their confessions had been coerced by applying an impermissible standard, to wit: the probable truthfulness of the confessions instead of accepted standard of voluntariness.

They further argue that if this impermissible standard was not applied in whole, it was at least applied in part, contrary to the holding of *Rogers v. Richmond*, 365 U. S. 534 (1961). In support of their argument, they rely upon the following statements found in the opinion of the New Jersey Supreme Court, 34 N. J. 212, 168 A. 2d 1, affirming the decision of the Superior Court in denying the application for a new trial, 63 N. J. Super. 16, 163 A. 2d 593.

The first of these statements is found at 34 N. J. 227, 168 A. 2d 9:

> "Finally, the testimony of the defendants at the hearing below, lacks credence."

The next, 34 N. J. 228, 168 A. 2d 9:

> "Substantial truth rests in the record of the original trial."

And, finally:

> ". . . We have examined the record with care and have concluded that the proffered evidence was untrue

and that there is no reasonable basis to say that the confessions were involuntary or that the State suppressed any evidence." 34 N. J. 228, 168 A. 2d 9.

We respectfully submit that these quoted statements are taken out of context and when restored to their original position and meaning lend no support for appellants' contentions. This argument was brought to the attention of the New Jersey Supreme Court on appellants' application for a new trial, based upon newly discovered evidence. This application for a new trial was filed approximately 16 months after the original trial and about 28 months after the murder.

At the hearing on this application the defendants took the stand and testified that they were beaten by the police at the time of their interrogations; they were under the influence of narcotics; they were deprived of sleep and food; they were continuously questioned by the police who "fed" them the story which ultimately appeared in their confessions. They further disavowed their confessions and testified to a version which they then claimed was the true story of the homicide. In this new version they claimed they did not go to the victim's store to commit robbery, but to collect a debt.

A complete digest of the testimony offered by the defendants themselves and by their witnesses, is found in the opinion of the trial court who heard the testimony at 63 N. J. Super. 16, 162 A. 2d 593 and outlined in the opinion of the New Jersey Supreme Court commencing at 34 N. J. 219, 168 A. 2d 4. Upon a reading of the New Jersey Supreme Court's opinion, quoted above, it will be seen that the court was dealing with the question of whether a new trial should be ordered on the grounds that the defendants' confessions were untrue, and not with the standard of

formula to be applied in determining whether the confessions were voluntary.

In other words those quotations were extracted from an opinion dealing with an application by these defendants for a new trial on grounds of newly discovered evidence. The testimony at the hearing on the County Court level, 62 N. J. Super. 16, 163 A. 2d 593 (1960), aff'd 34 N. J. 212, 168 A. 2d 1 (1961), submitted by the defendants, differed entirely in substance from the admissions and narrative related in the confessions. The quotations, which the defendants claim are indicative of the fact that the New Jersey Supreme Court concluded the confessions were admitted into evidence because they were considered to be the truth, in whole or in part, actually were in no way involved in the question of the voluntariness of the confessions.

The language which the New Jersey Supreme Court used conveyed the meaning that the confessions contained the truth, in contrast to the evidence which the defendants gave at the hearing on the application for a new trial, and which differed from that in the confession. At no point in any proceeding involving these defendants is there the slightest suggestion that the admission of the confessions in evidence was based on the factor of truthfulness, rather than voluntariness. The District Court below so interpreted the remarks of the New Jersey Supreme Court. Therefore, it correctly concluded that this argument was without basis (69a). When the New Jersey Supreme Court dealt with the question of the voluntariness of the confessions, 34 N. J. 212, 223, 224, it never referred to the point of the truthfulness of the confessions.

At the original trial after the attorney for Cassidy answered he had no testimony or evidence to offer on the question of the voluntariness of the confessions (153a) the court specifically found that the Cassidy confessions "were voluntarily secured from that defendant" (154a). And at

the same trial after the State moved the court to determine that the confession of Johnson was voluntary, the attorney for Johnson objected, claiming the confessions were involuntary because there were no facilities provided for the defendant to rest or sleep and "some time elapsed between the arrest of defendant and the actual taking of the confession." (J403a). The court overruled this objection and found that the Johnson confession was voluntary (221a). Nowhere in the record of the original trial did the court make its determinations that the confessions were voluntary on the basis of the truthfulness thereof. As a matter of fact, at the time the court made its determinations it had not seen or heard of the contents of the confessions.

We submit that there is no basis for the contention that the New Jersey courts applied an impermissible standard in determining whether the confessions were voluntary.

III.

The defendants were found guilty by a fair and impartial jury.

At the original trial, the fourteen jurors were empanelled to sit and hear the case, pursuant to the provisions of N. J. S. 2A 72-4. Under this statute, the court may excuse any of the jurors provided that the number is not reduced to less than twelve. If more than twelve are left on the jury at the conclusion of the court's charge, all of the remaining jurors' names are placed in a suitable box and twelve of the jurors are selected to determine the issues. On the voir dire, juror Grace M. Wheeler was asked the following question:

> "Have you ever been the victim of a robbery, or has any of your friends or relatives ever been the victim of a robbery?"

She answered:

"No, I have not, no one that I know of."

She was seated as one of the fourteen jurors. She sat during the trial, but was excused for illness before its conclusion and did not participate in the jury's deliberations.

At the hearing on the application for a new trial, she testified that her husband had been the victim of three armed robberies about 18 or 19 years before she was summoned for jury duty at the original trial. That at the time she answered questions on the voir dire she believed she had told the truth. She did not remember the incidents relating to her husband and, in fact, the truth was that had she, she would have told it if that would have excused her as a juror. She had completely forgotten about it. The first she recalled the incident was about six months after the jury trial. The subject matter came up in a conversation between herself, her husband and a third party, and she exclaimed she was asked that question but had not thought about it. The memory of these incidents did not remain with her.

She further testified that she had never discussed the facts of the case with any other member of the jury and, of course, had not discussed any of the facts of her husband's experience with the jury and that she had never heard any of the jurors discussing the case (Wheeler, 288a-292a).

Another juror, Alice Conroy, testified that the jurors did not discuss the case among themselves because the court had cautioned them not to discuss it (Conroy, 286a-288a). Three other jurors were called, by the defendants, who were present in the court room, but were not asked to testify and were excused by the appellants (293a to top of 294a). Based upon these facts, the trial judge who heard the testimony on the application for a new trial, concluded:

"Her testimony at this hearing indicates that the case of these defendants was not discussed during the trial between sessions by the jury since the court had impressed upon the jurors their duty was not to discuss the case until it had been concluded and they had reached the point of deliberating on the verdict. The fact that she stated she did not recall her husband's experience until six months after the trial was concluded would justify the inference that even if there was some discussion she did not talk about her husband's experience. Nevertheless, since she was not a part of the jury which rendered the verdict it can not be said that the jury's verdict was tainted." 63 N. J. Super. 16, 37, 162 A. 2d 593, 604.

On appeal, the New Jersey Supreme Court unanimously affirmed the findings of fact and conclusions of law found by the court below. 34 N. J. 212, 168 A. 2d 1 (1961); cert. den. 370 U. S. 928 (1962). Both the trial court below and the New Jersey Supreme Court on appeal, distinguished the facts from the case at bar from those found in *U. S. ex rel. Devita v. McCorkle*, 248 F. 2d 9 (3rd Cir. 1957), cert. den. 355 U. S. 873 (1957). It was pointed out by the New Jersey Supreme Court that in the case at bar, Mrs. Wheeler, unlike Kuhnle, the questioned juror in *Devita*, was not on the jury which found the defendants guilty. She was excused before the jury retired to deliberate.

Appellants persist in arguing that, notwithstanding these points of distinction, Mrs. Wheeler contaminated the verdict because she was a member of the fourteen-member jury panel for the approximate two weeks that the trial lasted. They argue through fanciful conjectures that Mrs. Wheeler may have transmitted her bias to the other jurors, notwithstanding the clear, uncontradicted testimony of Mrs. Wheeler and Mrs. Conroy, that the jury never discussed

the case amongst themselves because they were so instructed by the court.

Significantly we point out that three other members of the jury panel were present in the court room pursuant to their subpoenaes, but were never called to testify and were excused. The New Jersey Supreme Court dealt with this proposition by saying (id. p. 218, id. p. 4):

> "Additionally, we note that three other members of the jury were subpoenaed by the defendants, were present at the hearing, but were not called to testify. We think it fair to assume that if these jurors would have testified that any matters pertaining to the case were discussed prior to their deliberations, they would have been called by defense counsel."

The court below concluded that there was no merit on this point (91a).

We submit that the issue involved must be resolved on the uncontradicted facts rather than upon the mere conjectures of counsel. We feel that we could add nothing to the argument other than what the New Jersey Supreme Court has already said, and we rely thereon in support of our conclusion that the holding of the court below on this point should be affirmed.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

NORMAN HEINE,
Counsel for Respondent.

(Date)